of this merger proceeding. After an exhaustive investigation over many months, consisting of both witness interviews and the review of hundreds of thousands of documents, the Department of Justice took action with respect to the cellular overlaps between SBC and Ameritech and, in the course of requiring divestitures, addressed the only area of even possible concern with respect to loss of potential out-of-region competition – St. Louis. The consent decree requiring the sale of Ameritech's St. Louis cellular business to GTE upon consummation of the merger provides that the buyer (GTE) will obtain the permits and other assets that Ameritech Cellular could have used to enter the local exchange business in St. Louis.

As the DOJ concluded, the documents submitted to the Commission and the other evidence adduced in this proceeding provide no basis for the assertion that any real potential competition between SBC and Ameritech will be lost through the merger. No commenter provides any evidence to refute this conclusion.

II. THE PROPOSED CONDITIONS ENSURE THAT THE MERGER'S PRO-COMPETITIVE BENEFITS WILL BE REALIZED

Given the benefits that the merger will bring to local, national, and global markets and the absence of any anticompetitive effects, SBC and Ameritech firmly believe that the merger is in the public interest without any conditions. But, to assuage concerns that the merger's benefits will not materialize and to address any remote, speculative possibility that competition in some markets may be threatened, SBC and Ameritech will comply with a series of unprecedented Conditions. These Conditions will guarantee that the National-Local Strategy will be implemented rapidly in 30 out-of-region markets and that its pro-competitive benefits will not be delayed. They unquestioningly provide further incentives for, and facilitate local competition in, SBC's and Ameritech's regions for both residential and business customers. And they will

accelerate advanced services deployment and competition for data traffic. Moreover, SBC and Ameritech – in stark contrast to AT&T, MCI WorldCom and other merger parties that have appeared before the Commission – have agreed to specific Conditions targeting residential customers, including those in low-income urban and rural residential communities. Indeed, several commenters praised SBC's and Ameritech's commitment to low income urban and rural groups. See, e.g., Communications Workers of America at 1-2 (applauding SBC's and Ameritech's commitment to network investment to low-income urban and rural residential communities, including its agreement to deploy xDSL service in wire centers serving low-income urban and rural customers, its investment in its Lifeline programs, and its pledge not to charge residential customers any minimum monthly charge for long distance); Campaign for Telecommunications Access and 51 Participating Commenters at 10-17 (finding that the merger is likely to help make broadband technologies available in more geographic areas and to more people "regardless of age or disabilities").[39] Tough remedies and reporting and auditing requirements will enable the Commission and others, including state commissions and competitors, to monitor the progress of all the merger's benefits and ensure that SBC/Ameritech stays on its promised course. With these Conditions, there cannot be any doubt that the merger will improve consumer welfare and promote competition.

AT&T and other commenters raise objections to particular Conditions, which we will discuss in due course. But they also attack the Conditions more generally. They claim that the Conditions are too vague, that their duration is too short, or that their implementation will be

[39] See also WomanSpirit at 1; The Cornerstone Partnership at 1; National Council of La Raza at 2.

delayed. MCI WorldCom at v-vi, AT&T at 8-11, Sprint at 7, Winstar at 12. None of these general claims has merit.

For example, to support its claim that the Conditions are too vague, Sprint highlights supposedly offending terms such as "technically feasible," "commercially feasible," and "commercial volumes." These terms, of course, have been used and approved by the Commission in other contexts and cannot possibly be rejected now for vagueness.[40] As to the claims that the Conditions sunset too soon, see, e.g., AT&T at 11, or should not sunset at all, see, e.g., MCI WorldCom at 63, these commenters fail to acknowledge the similar duration of conditions in prior Commission merger orders[41] or to explain why a longer period is required here. The Conditions are not designed to micromanage SBC/Ameritech's business indefinitely; they are designed only to ensure that markets remain open. Moreover, because SBC/Ameritech will remain subject to the general rulemaking and adjudicatory powers of the FCC and state commissions after the merger, competitive issues can be addressed as they arise. It is not necessary (and would not be permissible) to try to anticipate and resolve all such issues in new Conditions that are unrelated to the merger and the record developed in this proceeding.

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[40] See BA/NYNEX, 12 FCC Rcd at 20089, ¶ 229; Memorandum Opinion and Order, Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 12 FCC Rcd 22665, 22724, ¶ 122 (1997); Memorandum Opinion and Order, Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599, 20671, ¶ 108 (1998) ("Louisiana Order"); First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15599-613, ¶¶ 192-220 (1996) (discussing the definition of "technically feasible" and "technically feasible points of interconnection") ("Local Competition Order"), modified on recon., 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd in part, aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999); 47 U.S.C. § 251(c)(2)(B).

[41] BA/NYNEX, 12 FCC Rcd at 20070, ¶ 181 (prescribing a sunset of provisions after forty-eight months).

As for claims that SBC and Ameritech will delay implementing the Conditions, see, e.g., AT&T at 10-11; MCI WorldCom at 7; Time Warner at 6-7; Focal at 14; Corecomm at 5-7; TRA at 33; Level 3, at 6; ALTS at 13-14, there is no reason to expect that SBC/Ameritech will fail to comply with its promises. The Commission assumes that parties will comply with their stated commitments.[42] In addition, the Conditions themselves contain unprecedented remedies that would be triggered by any such delays, that are in addition to the Commission's general enforcement powers.

Several commenters nonetheless urge the Commission to require satisfaction of all or most of the Conditions before the merger is even approved. See, e.g., MCI WorldCom at 3-7, Sprint at 2, Time Warner at 8; ALTS at 3; Cable & Wireless at 3-4. MCI WorldCom even wants the Commission to delay consummation of the merger for an indefinite period, by making section 271 relief in multiple states a precondition of the closing. MCI WorldCom at 7. What these commenters are really asking is for the Commission to kill the merger through delays in order to strengthen their own market position. This Commission has previously approved mergers with major conditions that apply after the merger has been approved.[43] There is no reason – and the commenters have offered no reason – for a radically different approach in this case.

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[42] MCI WorldCom Merger Order, 13 FCC Rcd at 18131-34, ¶¶ 189-192 ; AT&T/TCI Merger Order, 14 FCC Rcd at 3230-31, ¶ 148.

[43] See, e.g., BA/NYNEX, 12 FCC Rcd at 19992-93, ¶¶ 13-14, 20070-79, ¶¶ 181-200 (prescribing entry-barrier-reducing Conditions across the entire region covered by Bell Atlantic and NYNEX); Memorandum Opinion and Order, Applications of Craig O. McCaw & Amer. Tel. & Tel. Co. for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and Its Subsidiaries, 9 FCC Rcd 5836, 5928-29, ¶¶ 176, 178, 182-184 (1994) (imposing Conditions on provisioning of interexchange service and cellular service and equipment, and on the development of proprietary technology, and specifying that the company follow certain customary proprietary network information (CPNI) rules).

If the Commission were to depart from its previous rulings and require that the Conditions be satisfied before merger approval, the effect would be tantamount to denying the merger outright. As SBC and Ameritech have repeatedly explained, this merger is a necessary response to today's industry trends and developments. The telecommunications industry is a dynamic one, and transactions that make economic sense today will not make sense tomorrow. As the D.C. Circuit has recognized, "[i]n this dynamic and technologically innovative industry, a proposed venture may become obsolete in just a few years." United States v. FCC, 652 F.2d 72, 95 (D.C. Cir. 1980) (en banc). "To delay a proposed project six months will increase capital cost and diminish technological advantage; to delay it a year or more may destroy its attractiveness as an investment." Id. SBC and Ameritech weighed the benefits of this merger a year ago when they filed their applications for license transfer approval with the Commission. They cannot sit on the sidelines awaiting a multi-year Commission approval process.

The merger's delay is already a drain on the current business operations of SBC and Ameritech. While this Commission's review of the merger goes on, the companies' uncertainty regarding their future impedes strategic and day-to-day decisionmaking and hampers them from seizing other opportunities that arise. Prolonging the uncertainty surrounding this Commission's review would also be unfair to the thousands of SBC and Ameritech employees whose lives and careers will be affected by the merger. This is true particularly for Ameritech cellular employees in Chicago and St. Louis – two cities where Ameritech has agreed to sell its cellular interests as a condition of the merger. It is simply unfair to leave these Ameritech employees twisting in the wind.

Moreover, SBC and Ameritech will comply with a multitude of Conditions before closing the merger. The companies will, in all 13 in-region states, file a collocation tariff and/or

offer agreement amendments containing standard terms and conditions for collocation. They will provide an independent auditor's report on collocation terms and conditions. SBC and Ameritech will incorporate advanced services subsidiaries before merger closing, negotiate agreements between the subsidiaries and the ILECs,[44] and file them for approval. SBC and Ameritech will also file for any necessary state certifications or approvals to provide advanced services. SBC and Ameritech have also made pre-merger closing commitments relating to OSS. Before closing the merger, the applicants will provide the FCC with an OSS Process Improvement Plan and (in 11 states) will provide CLECs access to the same loop pre-qualification information that SBC's and Ameritech's retail operations obtain. Moreover, in the SBC states, SBC will implement 20 required performance measures (with two months of data) by either August 1 or November 1, 1999. The applicants will also implement a billing solution to shared transport in the Ameritech states and withdraw Ameritech's proposal for the FCC to establish a separate transit service rate to be charged in conjunction with shared transport. Finally, the Applicants will engage an independent auditor to conduct the ten-month collocation audit and the first annual compliance review.

This catalogue of pre-closing Conditions more than satisfies any legitimate concerns about pre-merger implementation, while at the same time guaranteeing that the benefits of the merger will not be delayed to the point that it no longer makes economic sense for either SBC or Ameritech to continue. In addition, a substantial number of conditions become effective on the merger closing date or within 30 days of that date.

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[44] We use the term SBC/Ameritech ILEC to mean the BOCs of SBC and Ameritech, as well as SNET, and to exclude any rural telephone company (as defined under 47 U.S.C. § 153(37)) that may be owned by SBC/Ameritech.

In sum, the general attacks on the Conditions fall far short of contradicting SBC's and Ameritech's showing that the merger is in the public interest, and the proposed Conditions more than adequately address any concern that could be raised concerning the merger.

A. Ensuring Out-of-Region Competition/Benefits of the National/Local Strategy.

This merger will result in greatly increased competition outside the current regions of SBC and Ameritech because it will provide the resources necessary to implement the National-Local Strategy. Under that Strategy, SBC/Ameritech will enter at least 30 major out-of-region markets as a facilities-based provider of services, not only to large business customers, but also to small business and residential customers. The scope of the National-Local Strategy exceeds the efforts of all other CLECs and will go far toward making the 1996 Act's goal of robust competition in telecommunications markets a reality.

SBC and Ameritech are firmly committed to implementing the National-Local Strategy. Indeed, as we have discussed in earlier filings, that Strategy is one of the driving forces behind this merger, and much of the value of the merger for current shareholders lies in the expected benefits of the National-Local Strategy. The Applicants have repeatedly committed themselves – in statements to this Commission, Congress, the DOJ, the SEC, state regulators and their shareholders – not only to implementing the plan, but also to implementing it quickly. In their reply comments filed late last year, the Applicants stressed that they had already determined that their original 36-month timetable for expanding out-of-region was too slow and that they had

therefore accelerated that timetable by six months.[45] Indeed, SBC has already taken a number of major steps to allow it to pursue the Strategy quickly after the merger closes.

Given their firm and public commitment to the National-Local Strategy, as well as the Commission's willingness to accept unconditioned service promises by other merging parties in the past, SBC and Ameritech do not believe any Conditions are necessary to ensure its rapid implementation. Nonetheless, SBC and Ameritech have agreed to a series of unprecedented commitments governing the schedule by which that Strategy will be carried out and requiring substantial payments if that schedule is not met. These commitments leave no room for doubt that SBC and Ameritech will implement the National-Local Strategy and that it will bring the benefits described.

First, the Applicants have agreed to an aggressive schedule not only for beginning the rollout of service, but also for entering all 30 markets. Specifically, SBC and Ameritech have committed to enter the first three markets (Boston, Miami and Seattle) within one year after the merger closes; to enter 12 additional markets within 18 months after closing; and to enter all 30 within 30 months of closing.[46]

Second, the Conditions set forth requirements for specific objective steps that SBC/Ameritech must take in each market, both at the time of initial entry and thereafter. By the initial entry dates, SBC/Ameritech must install a switch, or obtain switching capability from a party other than the ILEC, and must provide service to at least one unaffiliated business customer

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[45] Kahan Reply Aff. ¶¶ 21-22.

[46] There is an alternative date for entry into the last 15 markets; entry will be timely at the later of 30 months after closing or 60 days after the company first holds valid authorization to provide originating voice and data interLATA services to at least 60 percent of all access lines served by its ILECs. Conditions ¶ 61.

or one non-employee residential customer. In addition, no later than one year after initial entry, SBC/Ameritech must have collocated facilities in at least 10 wire centers in each market, must offer facilities-based service to all business and residential customers in the areas served by those wire centers, and must offer service, whether by resale, UNEs or facilities, to all customers within the market.[47] These Conditions ensure that SBC/Ameritech's entry will occur quickly and be substantial.

Finally, the proposed Conditions provide remedies if SBC/Ameritech fails to meet any of its commitments. The cost for such a failure with respect to any particular market is a contribution of $40 million to a fund to provide telecommunications services to underserved areas, groups or persons. Since there are 30 markets, the potential liability for noncompliance amounts to $1.2 billion. SBC/Ameritech's agreement to risk such enormous exposure demonstrates just how committed it is to beginning quickly and then expanding service in these 30 markets.

There can be no question, then, that SBC/Ameritech's entry into 30 out-of-region markets is imminent and that consumers will benefit from the increase in competition. As a number of the commenters recognize, the proposed Conditions regarding the timetable for SBC/Ameritech's entry into 30 major out-of-region markets provide additional assurance (although none was needed) that this merger will result in an enormous expansion of competition, especially for residential customers. Indeed, this fact is acknowledged not only by

[47] This last condition specifies that SBC/Ameritech must offer local exchange service through some mixture of resale, UNEs and facilities-based service to all business and residential customers in each market that are within (i) the local service area of the incumbent RBOC located within the Primary Metropolitan Statistical Area ("PMSA") of the market and (ii) the service area of a Tier 1 ILEC serving at least 10 percent of the access lines in the PMSA.

commenters who support the merger but also by others who remain critical. See Level 3, at 18 (admitting the existence of "hefty" penalties for failure to comply with the timetable); AARP at 4 ("appreciat[ing] the ambitious schedule"); Citizens Action of Illinois at 3 (conceding that the timetable "requires extensive entry").[48] These comments, however grudging, make clear that SBC/Ameritech's commitment to the National-Local Strategy is very real.

The handful of commenters who continue to question that commitment repeat the same refrain of "it's not enough" that they make with respect to virtually every Condition. In particular, they complain that the Applicants have not committed to achieve some specific and substantial number of customers in each market. AT&T even asserts that SBC/Ameritech should be required (under the sanction of heavy penalties if it falls short) actually to achieve the hoped-for market shares that were contained in SBC's preliminary business plan.[49]

These complaints are completely unreasonable. No company embarking on such a venture can be sure exactly how successful it will be, much less commit to pay as much as $1.2 billion in penalties if it does not turn out precisely as hoped. The purpose of the Conditions is to establish beyond all doubt the bona fides of the National-Local Strategy by setting concrete requirements under the Applicants' control, such as rapid timetables for market entry, for acquiring facilities in those markets, and for actually offering service to the public. Of course

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[48] Other commenters who support the merger also acknowledge the force of the proposed Conditions regarding out-of-region entry. See Ohio Consumers' Counsel at 9 (these Conditions "significantly improve the public benefits of the National-Local Strategy" by providing a "definite timeline" for entry, requiring service to residential customers and establishing a "definite penalty" for failure to meet the conditions); Communications Workers of America at 5 ("the hefty penalties that the merged entity would incur should it fail to make promised investments in out-of-region markets serve as powerful incentives to promote the 1996 Act's goal of facilities-based competition").

[49] See AT&T App. A at 102-104. Other commenters make similar demands. See Citizens Action of Illinois at 3 (Commission should "impose penalties where SBC-Ameritech fails to achieve a determined level of residential penetration"); Level 3, at 17-18; MCI WorldCom at 58-59.

SBC/Ameritech fully intends to be successful in building a substantial out-of-region customer base. Indeed, that goal is the driving force behind the merger. No set of conditions, however, can guarantee that a specific amount of business will actually be achieved on a predetermined schedule, and it is not the job of the Commission to penalize companies based on their performance in the market. The point is that these Conditions make clear the unshakeable commitment of SBC/Ameritech to implement the National-Local Strategy.[50]

B. Ensuring Open Local Markets.

SBC/Ameritech's commitment to the National-Local Strategy guarantees that competition in 30 out-of-region markets will flourish. But the benefits to local competition are not restricted to markets outside of SBC/Ameritech's region. SBC and Ameritech have also pledged to advance competition further within their combined 13-state region, by agreeing to an unprecedented series of Conditions that go far beyond the requirements of the 1996 Act and that will further open local markets.

1. Carrier-to-Carrier Promotions.

Perhaps the most obviously beneficial Conditions are the three carrier-to-carrier promotions that will be made available to spark residential competition in all 13 SBC/Ameritech states: (a) the 25 percent average discount on unbundled local loops (Conditions ¶ 46); (b) the wholesale discount rate of as much as 32 percent for resold services (id. ¶ 47); (c) and the

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[50] AT&T also revives its baseless claim that SBC and Ameritech would have independently undertaken a massive out-of-region expansion absent the merger, claiming that SBC/Ameritech's expert economist, Dr. Dennis Carlton, conceded that each would have entered 15 major markets by themselves. AT&T, App. A at 100. This is not true, and AT&T knows it. To the contrary, Dr. Carlton's report expressly confirmed his understanding that, absent the merger, there would be no such expansion, and he concluded that the merged entity would enjoy advantages that neither company had alone and that would allow it to undertake such expansion. Carlton Aff. ¶¶ 20-35.

availability of end-to-end network element combinations (the "UNE platform") (id. ¶ 48). These promotions are over and above the terms SBC/Ameritech is required to offer new entrants under the 1996 Act and the Commission's rules. And they are not the only promotions required by the Conditions. Data CLECs additionally will benefit from a discount of 50 percent on recurring charges for loops under the Surrogate Line Sharing terms of Paragraph 34, as well as an OSS-related discount of yet another 25 percent on recurring and nonrecurring charges for loops under Paragraph 35. Together, the promotions offer CLECs wholesale discounts that are commonly twice as large as the discounts set by state commissions pursuant to federal law. They provide rates for unbundled local loops that are, on average, 25 percent (or much more, in the case of CLECs offering data services) below the cost-based rates determined by state commissions. And, casting aside pending disputes about the 1996 Act's unbundling requirements, they make available the UNE platform, which some CLECs (wrongly) maintain is the only viable way to compete.

The resale, local loop, and UNE platform promotions are targeted at the residential segment of the market that most CLECs avoid as insufficiently profitable. They will help to interest CLECs in narrowing a growing chasm between the competitive offerings available to businesses and the competitive offerings available to residential callers. The Commissioners, as well as state PUCs, have recognized the importance of ending CLECs' residential red-lining, and the carrier-to-carrier promotions will help to do just that.[51]

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[51] As Chairman Kennard recently put it:

> [I]t's not enough if, in a city like Nashville, only large businesses have choice in local phone service. If that's all we get out of the Telecom Act, then we will have failed the American public. Because the goal is to bring all Americans the benefits of a competitive marketplace, we must redouble our efforts to bring choice to residential subscribers . . . .

The criticisms most often leveled at these promotions – that they do not last long enough or should apply to more customer lines – utterly miss the point. See, e.g., AT&T at 9-10; Sprint at 34-35; MCI WorldCom at 51-54; TRA at 27-28; Focal at 3-7. The promotions are limited in duration and have volume caps because they are not designed as a long-term subsidy for uneconomic entry, or as a giveaway of SBC/Ameritech end user customers. Rather, they are intended to further the Commission's goal of promoting residential competition by causing CLECs quickly to pursue the local residential customers who have to date been low on their priority lists. This spark should ignite long-term competition in the residential market within SBC/Ameritech's region; that competitive fire thereafter will be fueled by open local markets and the assistance and discounts routinely available to new entrants under the 1996 Act and state law.

Extending the promotions to business or data exchange access services would defeat their purpose.[52] CLECs need no special incentive to pursue these high-profit customers and services, and offering promotions that are equally available for all types of services would do nothing to encourage CLECs to reconsider serving neglected residential market segments.[53] At the same time, and contrary to TRA's suggestion, the promotions do not require carriers to "sustai[n] residential [service] as a stand-alone market." TRA at 28. The promotions are available to all

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FCC Chairman William E. Kennard, A Competitive Call to Arms, Address at the Association of Local Telecommunications Services (ALTS) Convention, Nashville, Tenn. (As Prepared for Delivery), 1999 FCC LEXIS 1893, at *5 (May 3, 1999).

[52] AT&T objects that promotional loops and platforms may not be used to provide access in addition to local service. AT&T App. A at 86-87. AT&T is mistaken. Nothing in the Conditions prevents a CLEC that provides local residential service over a promotional line from providing access to its residential customer.

[53] NorthPoint, for example, notes that there is already "intense competition among DSL competitive LECs," confirming that special assistance is not needed. NorthPoint at 5.

carriers regardless of their overall balance of business and residential service, provided that they use the promotional offerings to serve residential customers in accordance with the Conditions.

Nor will the volume caps on the residential promotions render them unattractive to CLECs. The local loop promotion, for example, will make as many as 1.6 million local loops available at an 25 percent average discount. By targeting high-volume residential users, CLECs can use these lines to capture a disproportionate share of revenues. Similarly, the wholesale discount of 32 percent off of the retail rate represents an effective discount of 10 to 25 percent off of the otherwise applicable wholesale prices; this discount (together with the UNE platform promotion) will be available to serve as many as another 2.6 million lines, or nearly seven percent of all the residential lines in SBC/Ameritech's territory. The bottom line is that CLECs can win more than 4.2 million lines, or approximately 12 percent of all SBC/Ameritech's current residential lines (and a higher percentage of SBC/Ameritech's residential revenues), through these three promotions alone, giving them a firm base in the residential market.[54]

Arguments that the promotional periods are too short or uncertain likewise miss the mark. If the promotions were not of limited duration, they would not encourage CLECs to place a higher priority on near-term residential entry. The CLECs would continue to sign up business customers while keeping residential service on the back burner. As for supposed uncertainty about approaching deadlines, Paragraph 49 guarantees CLECs periodic notices that the cap for the UNE platform and resale promotions is approaching. Even more fundamentally, if CLECs

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[54] CoreComm maintains that the volume caps should apply to active loops, not loops for which a CLEC is no longer providing service. CoreComm at 18-19. That would expose SBC/Ameritech to open-ended losses, and would serve little beneficial purpose. The point of the residential promotions is to help CLECs enter the market and win residential customers; it is not intended to insulate them from the consequences of losing existing customers, a normal risk in competitive markets.

fear that other CLECs may beat them to the promotions, that will only cause the CLECs to enter the residential market faster to guarantee benefits for themselves. Again, competition and consumers will benefit. It also should be noted that a CLEC that obtains a promotional facility or service is guaranteed the promotional terms for that facility or service for a 3-year period. See Conditions ¶¶ 46.c., 47.b., 48.b. Three years is an eternity in the rapidly changing telecommunications industry, and gives CLECs have ample certainty to plan their rollout of residential services.[55]

The further argument, made primarily by large long distance carriers, that the promotions are unlawful under the 1996 Act is absurd on its face. The promotional terms will not be imposed by federal or state regulators under the local competition provisions of sections 251 and 252. Rather, as explained in Paragraph 45 of the Conditions, SBC/Ameritech will implement the promotions by offering to amend its interconnection agreements with CLECs to incorporate the promotional terms. Such offers are outside of the requirements of sections 251 and 252 and serve to accomplish the purposes of the local service provisions of the 1996 Act, which were "intended to facilitate market entry."[56] As Senator Pressler, the manager of the Senate bill, explained, the new legislation required LECs "to open and unbundle their local networks, to

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[55] MCI WorldCom complains that the 3-year period is "largely meaningless" because it may (or may not) overlap the period during which upgrades to SBC/Ameritech's network will be made pursuant to other Conditions. MCI WorldCom at 53; see also Sprint at 33-35. That is nonsense, since SBC/Ameritech will be required at all times to provide OSS access and other facilities and services in accordance with the Communications Act, FCC rules, and state requirements.

[56] AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 726 (1999); see also Reno v. ACLU, 521 U.S. 844, 857 (1997) (Act "designed to promote competition in the local telephone service market"); MCI Telecommunications Corp. v. Illinois Commerce Comm'n, 168 F.3d 315, 317 (7th Cir. 1999) (local competition provisions of 1996 Act designed "to introduce competition into local telephone service markets by ending the historic monopoly held by incumbent local exchange carriers"), amended, No. 98-2127, et al., 1999 U.S. App. LEXIS 13941 (7th Cir. June 23, 1999).

increase the likelihood that competition will develop for local telephone service." 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler). In particular, Congress wanted to spur facilities-based competition, including facilities-based competition to serve residential customers.[57] Congress desired and expected that this new local competition would take shape through voluntary offers by carriers, not simply the enforcement of statutory requirements.[58]

a. The Promotions Are Not Discriminatory Under Sections 251 or 252. The promotional discounts for unbundled local loops and resale, and the UNE platform offer, represent exactly what Congress hoped would come out of the 1996 Act: arrangements developed outside – and over and above – the strictures of regulatory rules, which help CLECs provide competitive local service, particularly to residential customers. AT&T, MCI WorldCom, and Sprint would like to block this additional local competition because the entry of other CLECs will make it harder to convert their own long distance market share into local market share. But while these carriers and their trade associations invoke the 1996 Act and Commission rules, neither supports their position. Both the statute and the rules give ILECs and CLECs wide latitude to enter into customized contractual arrangements, subject to (1) statutory backstops if the parties cannot agree and (2) the section 252(i) requirement that any negotiated arrangement must be made

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[57] See, e.g., Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, Amendment of the Comm'n's Rules to Establish Competitive Serv. Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Servs., 11 FCC Rcd 16639, 16678-79, ¶ 80 (1996) ("[t]he interconnection provisions of the Act, Section[s] 251 and 252, are designed to promote facilities-based local exchange competition"); S. Conf. Rep. No. 104-230, at 1 (1996) (Act "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies"); id. at 148 (drafters of Act contemplated that it would promote facilities-based, "local residential competition").

[58] Iowa Utils. Bd. v. FCC, 120 F.3d 753, 801 (8th Cir. 1997) ("The structure of the Act reveals the Congress's preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements."), rev'd in part on other grounds sub nom., AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

available to all interested CLECs. These two limitations fully ensure that ILECs cannot unfairly favor or disfavor any CLEC.

Section 252(a)(1) specifically provides that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1). Likewise, section 252(e)(2) requires a finding of compliance with section 251 when state commissions review arbitrated agreements, but not negotiated agreements. Id. § 252(e)(2). As the Supreme Court has held, "the incumbent can negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or (c)." AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. at 727 (footnote omitted).

Contrary to some parties' suggestions, see, e.g., AT&T App. A at 83-87, CompTel at 14-18, the Commission's rules do not take away the flexibility built into the statute. As the Eighth Circuit has explained, "[t]he FCC's rules and regulations [implementing the pricing provisions of the 1996 Act] have direct effect only in the context of the state-run arbitrations." Iowa Utils. Bd., 120 F.3d at 793 n.9. This Commission likewise noted in its Local Competition Order that "parties that voluntarily negotiate agreements need not comply with the requirements we establish under sections 251(b) and (c), including any pricing rules we adopt." 11 FCC Rcd at 15528, ¶ 54; see also id. at 15528, ¶ 56 (same); id. at 15876, ¶ 752 (rate structure rules apply to arbitrated agreements and statements of generally available terms and conditions); 47 C.F.R. § 51.3 (consistent with section 252(e)(2), "a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part").

Lacking any specific support for its discrimination argument, AT&T cites the Commission's determination that "nondiscriminatory," as used in the 1996 Act, is not necessarily synonymous with "'unjust and unreasonable' discrimination" as used in the 1934 Act. AT&T App. A at 84 (citing Local Competition Order, 11 FCC Rcd at 15928, ¶ 859). The Commission made this statement in the context of "[t]he nondiscrimination requirement in section 251(c)(2)" and, more generally, when considering "the term 'nondiscriminatory,' as used throughout section 251." Local Competition Order, 11 FCC Rcd at 15612, ¶¶ 217-218; see also id. at 15609-11, ¶¶ 213-216 (making clear that the FCC's interpretation of "nondiscriminatory" applies specifically to interconnection under section 251(c)(2)(D)). As explained above, these nondiscrimination requirements of section 251 do not apply to negotiated or voluntarily offered agreements. Likewise, the Commission has held that the section 252(e)(2)(A)(i) prohibition on discrimination "against a telecommunications carrier not a party to the agreement" prohibits only "unreasonabl[e] discriminat[ion]." Id. at 15876, ¶ 752. It plainly is not "unreasonable" for purposes of the 1996 Act for SBC/Ameritech to offer interested CLECs a voluntary arrangement that furthers the precise purposes of that law. See Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990) (statutory interpretation should be guided by object and policy of law).

The carrier-to-carrier promotions do not deny any CLEC an equal and nondiscriminatory ability to compete. AT&T App. A at 83-87. Every CLEC in SBC/Ameritech's region that wants to take advantage of the promotions may do so within the offer period. Moreover, any CLEC that wants different terms will remain free to negotiate them; during those negotiations, the CLEC could invoke the 1996 Act's arbitration provisions to trigger the pricing requirements of section 252(d) if they wish to obtain different pricing. See 47 U.S.C. § 252(b), (c). There is nothing discriminatory about giving CLECs this choice: take advantage of special opportunities

afforded by a promotion on exactly the same terms as other CLECs; opt into another CLEC's negotiated terms under 47 U.S.C. § 252(i); negotiate other mutually agreeable arrangements; or rely on the terms for entry established by this Commission and state regulators under the 1996 Act.

AT&T raises the specter of side deals between SBC/Ameritech and certain CLECs. AT&T at 15-16 & App. A at 85. This is absurd. The only way to favor a CLEC is to offer terms that are more generous than Congress required. Under section 252(i) – which is "a primary tool of the 1996 Act for preventing discrimination under section 251,"[59] – all negotiated terms will be available to all CLECs in the same state. Thus, all CLECs can, at their own option, benefit from any terms between SBC/Ameritech and a supposedly "favored" CLEC. As to equality between modes of entry, the three residential promotions collectively cover all three modes of entry that rely on ILEC facilities and services rather than on an entirely self-constructed network. Moreover, if the loop promotion serves to encourage deployment of competitive switching facilities as some CLECs say, that certainly would be consistent with Congress's view of the public interest.

b. The Limits on the Availability of UNE P's Further the Goals of the Act and Are Reasonable. Some parties suggest that the UNE platform promotion must, as a matter of law, be offered without usage restrictions, and may not be limited to residential local telephone exchange service. See AT&T at 10, 16 & App. A at 86-87; CompTel at 9-10, 12; Sprint at 33-36. This argument assumes that CLECs are currently entitled to obtain all network elements that make up

[59] Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 14171, 14263, ¶ 269 (1996).

the platform, in all geographic areas and for all customer groups, under sections 251(c)(3) and 252(d)(2). That issue is being considered on remand in Docket No. 96-98. It suffices for purposes of this proceeding to note that under AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999), there is no valid list of any mandatory UNEs, much less a list that requires end-to-end UNE combinations. Thus, while SBC and Ameritech individually have made voluntary commitments, see Conditions ¶ 43, and SBC/Ameritech will be subject to the final rules that emerge from the current UNE remand proceeding, at this time any UNE platform offer is outside the 1996 Act and not subject to section 251's limitations.[60]

AT&T and others object to averaging loop discounts across the SBC/Ameritech states. Their theory is that SBC/Ameritech may "offer very limited discounts in the most accessible or most desirable central offices while offering higher discounts only in the less accessible or less desirable central offices." CompTel at 17-18; see also AT&T at 10 & App. A at 89. The Conditions do not leave SBC/Ameritech unfettered discretion to allocate the discounts. Rather, they require that the promotional prices "shall, when considered as a whole, offer larger discounts where the otherwise applicable price established by the relevant state commission is higher, and lesser discounts where the otherwise applicable price established by the relevant state commission is lower." Conditions ¶ 46.d. While the opponents suggest that this is somehow anticompetitive, the opposite is true. Consistent with the over-arching goal of the promotions, targeting loop discounts to areas where CLECs currently have higher costs will broaden the base of local competition and benefit the public (as opposed to the bottom line of any particular

[60] Nor is there any merit to MCI WorldCom's suggestion that the Commission should attempt itself to set prices for the promotional UNE platform in all 13 SBC/Ameritech States, in disregard of jurisdictional provisions of the Communications Act. See MCI WorldCom at 52-53.

CLEC). Once again, the promotions are not subsidies for CLEC services that would be offered in any case; they are intended to speed local competition where it otherwise would develop only slowly or not at all.

The three carrier-to-carrier promotions required by Paragraphs 45 through 49 will provide unprecedented opportunities for CLECs to begin sustainable residential service operations in areas of SBC/Ameritech's 13-state region that today have little local residential competition. The 50 percent Surrogate Line Sharing Discount, the 25 percent OSS Discount and the carrier-to-carrier promotions allow CLECs to obtain facilities and services from SBC/Ameritech at a fraction of the prices deemed appropriate by Congress. If ever there were an ILEC offering designed to overcome the CLECs' reluctance to enter the local residential market, this is it.

2. Performance Measures and Payments.

SBC/Ameritech has agreed to 20 categories of performance measures, covering 36 sub-part measurements, with associated performance standards and benchmarks, that will apply in all 13 of its in-region states. These commitments are unprecedented in their scale and regional scope. If SBC/Ameritech fails to meet the stated performance levels, it agrees to pay liquidated damages to CLECs that suffer deficient performance and to make voluntary payments to a designated public interest fund. These payments could total as much as $1 billion. Thus, as NorthPoint notes with some understatement, the remedy scheme for failing to comply with the prescribed performance levels will "create a direct economic incentive for SBC/Ameritech to cure performance problems quickly." NorthPoint at 5.

Despite the breadth of the measures and payments required by the proposed Conditions, several commenters argue that the Conditions do not go far enough. Many want the Commission to adopt the complete list of measurements adopted by the Texas PUC or other state

commissions. See, e.g., Sprint at 56-58; Covad at 12-14; Adelphia/McLeodUSA at 22-23; ICG at 6-7; Level 3, at 6-7; Time Warner Telecom at 3-4. But the Federal Performance Parity Plan ("FPPP") is not designed to cover each and every facet of local competition, to supplant state performance programs, nor to preempt state consideration of performance measures for section 271 purposes. Rather, the FPPP indicates when SBC/Ameritech is providing parity or benchmark performance for a range of activities that have the most direct and immediate impact on CLECs and their customers; it creates incentives for SBC/Ameritech to provide parity or benchmark performance in these areas; and it allows SBC/Ameritech more quickly to identify and correct performance problems.

To accomplish these goals, SBC, Ameritech, and the Commission Staff established 20 performance categories. This list was limited both to stay within the scope of the proposed Conditions' purposes and to establish a manageable plan that can be applied across 13 states. As is, the 20 measurement categories in the FPPP yield a total of 236 actual measurements.[61] This number then must be multiplied by the number of carriers in each state for which measurements are collected – potentially producing tens of thousands of separate performance and reporting requirements in the 13 states. The FPPP thus establishes an extensive set of baseline standards that go to the heart of CLECs' ability to compete. Nevertheless, if a state commission believes that the FPPP is too limited for section 271 or other purposes, or otherwise inappropriate for its state, that commission may adopt an additional or different set of performance measurements that complements the FPPP.

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[61] This includes 47 company-wide measures and 189 which would be specific to a state or market area.

AT&T argues that the FPPP "would send the wrong message" to states that are drafting their own plan, because it might encourage them to use the FPPP as a stopping point. AT&T App. A at 2; see also ICG at 3. It is inconceivable that a plan such as the FPPP – which establishes standards, reporting requirements, and remedies for OSS preordering, ordering, performance, provisioning, repair and maintenance, and billing of resold services and UNEs, collocation, local number portability, and interconnection trunking based on the Texas collaborative process – could send anything but an unequivocal message in favor of strong performance programs. But in any event, the Applicants and the Commission have made it quite clear that the states are not preempted or bound to follow only the Commission's direction in this area.[62] AT&T's suggestion that the 1996 Act requires some particular performance plan (or, indeed, any plan at all) is flatly false. See AT&T App. A at 27. This makes SBC/Ameritech's proposed FPPP all the more significant as a public interest benefit.

The Indiana Utility Regulatory Commission ("Indiana Commission") contends that the FPPP is too complex, thus disagreeing entirely with AT&T's argument that it should be made more complex. Indiana Commission at 5. The Indiana Commission also says the FPPP is "problematic" because the plan is not designed to achieve performance parity between different states. Id. The local competition provisions of the 1996 Act, however, do not address and were not intended to create parity between the states; they address parity between the ILEC (whatever

[62] See Performance Measurements NPRM, 13 FCC Rcd at 12828-29, ¶ 24 (1998) ("The experience we gain from the development of the model performance measures and reporting requirements and their application by the states will, we believe, provide useful and important information that will enable us to decide whether to adopt national, legally binding rules in this area. The adoption of national, legally binding rules may prove unnecessary, however, in light of the states' and carriers' application of the model performance measurements and reporting requirements we propose to adopt in the first instance. We underscore, however, that we have no intention to issue binding rules in the first instance.").

its level of retail service) and its various competitors within a state.[63] Moreover, the test for approving the merger is whether the license transfer is in the public interest. That test is satisfied if the benefits of the merger outweigh any alleged harms. BA/NYNEX, 12 FCC Rcd at 19987, ¶ 2. As discussed above, the merger brings a multitude of consumer and competitive benefits to markets throughout the country, including Indiana. Indiana's real concern, which is that it "might not derive as much benefit from these Conditions as other states," Indiana Commission at 4 (emphasis added), is not relevant to this Commission's review because consumers and CLECs in Indiana and elsewhere will be better off as a result of the merger and the Conditions, including implementation of the FPPP.

AT&T maintains that some definitions in the FPPP are inadequate for use outside of the five-state SWBT territory. AT&T App. A at 19. The FPPP incorporates definitions that were reviewed and developed through a collaborative process and were approved by the Texas PUC, but can readily be modified to accommodate differences in systems utilized in other states and the requirements of individual state commissions. Although there may be differences in terminology and business rules between SBC and Ameritech systems (an issue SBC and Ameritech are prepared to resolve with the Commission and its Staff), the measurements contain specific details regarding what is being measured to allow easy translation. Moreover, Paragraph 4 of Attachment A of the Proposed Conditions provides for annual review of the measurements to allow revisions and updates as required.[64]

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[63] See Local Competition Order, 11 FCC Rcd at 15658, ¶ 312.

[64] NorthPoint asks for clarification that DSL-capable loops are included in the entire set of performance measures. NorthPoint at 26-27. In particular, NorthPoint notes that Measurement 1 sets different performance requirements for "complex" loops and UNE loops, but does not specify the classification of DSL Loops. Id. at 26. SBC and Ameritech believe that the measurements already include DSL. Measurements 6 and 7 are specifically

AT&T's criticisms of particular definitions are meritless as well. For example, AT&T claims that measurement 16 (OSS flow-through) is an "unresolved controversy" before the Texas and Missouri commissions. AT&T App. A at 19. The "controversy" (i.e., AT&T's arguments) has been resolved.[65] Similarly, AT&T's other criticisms are either untrue,[66] or ignore the differences between the business rules in different states.[67] Finally, AT&T levels an attack against all of these measures by arguing that there is a lack of documentation on how SBC/Ameritech will collect the data to be analyzed and reported. Id. at 21. In particular, AT&T claims that SBC has not completed the data collection process description in Texas. AT&T is mistaken. The data collection process description was provided to the Texas PUC and Telcordia on a section-by-section basis, the last section having been provided on July 9, 1999.

Some commenters claim that the payments for nonperformance are insufficient to provide SBC/Ameritech with the proper incentives to comply. See, e.g., ALTS at 3-4; CompTel at 38-42. This is ironic when some of these same commenters have argued to the Commission that

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dedicated to DSL, and DSL is specifically addressed in other measurements as well (e.g., 2c, 3c, 9c, 10c, 11c). SBC and Ameritech also believe that DSL-capable loops are "UNE loops" in Measurement 1. SBC and Ameritech have no objection, however, to a clarification.

[65] The Texas PUC staff have updated the business rule to include all electronic orders in the database. And SBC has clarified in both Texas and Missouri that flow-through is based on orders, not local service requests ("LSRs").

[66] For example, AT&T criticizes measurements 6 and 7 (DSL), falsely claiming that neither has been adopted in Texas. AT&T App. A at 20. Measurement 7 is identical to the measurement approved by the Texas PUC. Measurement 6 reflects a measurement that formerly was approved in Texas (and was only recently replaced).

[67] AT&T nonsensically argues that measurement 2a (POTS missed due dates) should be further disaggregated by order types (N, T, and C orders) that are not distinguished when due dates are set. Id. at 21. AT&T notes that measurement 2c's (ILEC-caused missed due dates) disaggregation levels should be state-specific. Id. It is true that UNEs in Ameritech's states might be different than those in Texas. That is why the relevant business rule and calculation given in Attachment A-1 refers generically to UNEs and are not limited to UNEs as defined in Texas.

various conditions proposed for their own mergers were unnecessary because these parties could be trusted – without any remedy at all for noncompliance – to comply with their stated promises.[68] And it would pervert the entire competitive model to set payment levels so high that CLECs would be better off if SBC/Ameritech's performance is deficient than if SBC/Ameritech provides superior wholesale performance. As it is, SBC/Ameritech faces $1 billion in payments for noncompliance under the FPPP, with the amount of the payments escalating as the severity of a performance deficiency and its duration increases. Moreover, in many SBC and Ameritech states, there are currently no payment plans, so the FPPP certainly exceeds the status quo in those states.

Although some CLECs have tried to dismiss this potential $1 billion liability as trivial, AT&T App. A at 105; MCI WorldCom at 20-24; Sprint at 66-69, the payment provisions will be quite severe in actual practice. Indeed, the liquidated damages are likely to be many times greater than the CLECs' monthly payments for the resold lines and many, many times more than the monthly retail profits (if any) SBC/Ameritech would gain by keeping the lines in retail service. Thus, it can hardly be said that the potential payments will not be an incentive to compliance.

Nor does the maximum level of payments established by the Texas PUC suggest that the maximum payments due under the FPPP are inadequate. See AT&T App. A at 5-7. Even putting aside that the Texas PUC's payment cap applies to 121 separate measurements as

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[68] See, e.g., AT&T's and TCI's Joint Reply to Comments and Joint Opposition to Petitions to Deny or to Impose Conditions, Joint Application of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and its Affiliates or Subsidiaries, CC Docket No. 98-178, at 78 (filed Nov. 13, 1998) (arguing that "AT&T and TCI commit to having all their telephony services available on a stand-alone basis" but arguing against the imposition of a condition imposing such a requirement) ("AT&T/TCI Application").

opposed to 20 measurement categories (and 36 separate measurements) in the FPPP, this line of argument ignores the single most salient feature of the FPPP – its region-wide scope. The possibility of incurring millions of dollars of liability in up to 13 states simultaneously will act as a powerful incentive for SBC to provide high-quality facilities and services to CLECs using its multistate systems. No single state plan (that would include anything approaching reasonable payment caps) could have the same impact.[69]

AT&T notes that the FPPP will not necessarily serve as an enforcement mechanism for the nondiscrimination requirements of the 1996 Act. AT&T App. A at 15, 16-19. The FPPP itself says as much. Conditions Attach. A ¶ 13. The plan provides SBC/Ameritech additional impetus for furnishing high-quality wholesale service and to give the CLECs an alternative to protracted complaint proceedings under interconnection agreements and the 1996 Act. Precisely because CLECs have enforcement options available to them in addition to the FPPP, the FPPP necessarily provides an additional, merger-related benefit to all CLECs.

AT&T claims that there is too high a risk that SBC/Ameritech could engage in discriminatory conduct that would not be detected by the statistical enforcement plan (i.e., there may be too many "false negatives"). But AT&T must concede that SBC/Ameritech should not make payments for "false positives" that result from random variation. Thus, AT&T's only objection is to the margin established by the Texas PUC – and used in the FPPP – to protect against such false positives. AT&T offers absolutely nothing to support its assertion that the

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[69] Finally, AT&T ignores the fact that the FPPP allows CLECs to recover damages under interconnection agreements or state performance monitoring plans if those awards are in excess of the FPPP amounts. See Proposed Conditions Attach. A ¶¶ 8, 11. So, effectively, the FPPP does not impose any cap at all on CLECs' ability to recover for performance that does not meet the standards of the 1996 Act or state performance standards. The liquidated damages simply serve as a way for CLECs to obtain compensation without having to pursue more costly and time-consuming remedies.

Texas PUC's decision of where to draw the statistical line was unfair or unreasonable. AT&T's heavy reliance on virtually every other aspect of the Texas plan, moreover, casts particular doubt on AT&T's effort to disparage this facet.

The benchmark statistical tests proposed in Paragraph 1 (the z-test and the K-table) represent generally accepted statistical procedures for determining if a hypothesis about the performance of a system is reasonable and should be accepted or is unreasonable and should not be accepted. The formulas proposed can be found in any statistics textbook. Under the Conditions, the possibility that SBC/Ameritech will be found non-compliant with its performance obligations due to random variation will – in some cases – approach ten percent. Again, the possibility of false negatives about which AT&T complains merely balances this chance that a given payment does not reflect deficient performance at all.

AT&T also claims that the Conditions lack an independent auditing procedure to validate the data produced by SBC/Ameritech. AT&T App. A at 22. Once again, AT&T is simply wrong. Paragraph 62.d. of the Conditions provides that an independent auditor shall annually provide "a statement regarding the accuracy and completeness of the performance data provided to CLECs and regulators under these Conditions." That annual audit should be sufficient to validate the data produced by SBC/Ameritech.

3. Reporting Requirements.

The performance measures of the FPPP are not the only detailed performance reports SBC/Ameritech will submit pursuant to the Conditions. SBC and Ameritech will also file, on a quarterly basis, state-by-state service quality reports in accordance with the NARUC Technology Policy Subgroup "Service Quality White Paper." Conditions Attach. A ¶ 54. SBC and Ameritech will report retail service data on installation and maintenance, switch outages,

transmission facility outages, service quality-related complaints, and answer time performance. SBC and Ameritech will also continue to report and make publicly available ARMIS data, as well, supplying separate information for each of its operating companies. Conditions ¶ 56.

As already explained, these requirements – along with many other conditions, such as the performance measures and audits – facilitate the Commission's and state commissions' ability to regulate by giving them additional data for benchmarking purposes. Thus, these requirements will not only help regulators to detect noncompliance with the Conditions, but also uncover any potential violations of the Act. The Commission's and PUCs' ability to regulate is therefore enhanced by the merger because the Conditions provide the Commission and the PUCs with new information that will allow meaningful comparisons and detection of discrimination against CLECs.

4. NRIC Participation.

SBC and Ameritech also will maintain their participation in the Network Reliability and Interoperability Council (NRIC), a committee organized by the FCC to make recommendations on how to ensure "optimal reliability, interoperability and interconnectivity of, and accessibility to, public telecommunications networks."[70] This committee will report on "the reliability of public telecommunications network services in the United States and will determine whether "best practices" previously recommended should be modified or supplemented."[71] No commenter has questioned the benefit of this condition. Although MCI WorldCom claims that

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[70] NRIC, Revised Charter for the Network Reliability and Interoperability Council (visited July 25, 1999) <http://www.nric.org/charter.html>.

[71] Id.

the requirement's success depends on how SBC/Ameritech participates, MCI WorldCom at 56, it provides no reason to doubt SBC/Ameritech's commitment to participation.

5. OSS: Enhancements and Additional Interfaces, Waiver of Charges, Assistance for Small CLECs.

a. OSS: Enhancements and Additional Interfaces.

The merger will enable SBC and Ameritech to establish uniform OSS interfaces and systems across 13 states that are based on the best practices of the two companies, and also incorporate significant upgrades as compared to the nondiscriminatory systems already available to CLECs. The proposed Conditions require that these benefits are realized. Pursuant to the Conditions SBC/Ameritech will:

- Deploy commercially ready, uniform application-to-application interfaces as defined, adopted, and periodically updated by industry standard setting bodies for OSS (Proposed Conditions ¶¶ 9, 11);
- Deploy uniform graphical user interfaces (id. ¶¶ 10, 11);
- Provide direct access to SBC's Service Order Retrieval and Distribution system or Ameritech's or SNET's equivalent service order processing systems (id. ¶ 12);
- Enhance SBC's existing electronic bonding interface for maintenance and repair (id. ¶13);
- Develop software solutions or uniform business rules to ensure that CLEC-submitted local service requests are consistent with SBC/Ameritech's business rules (id. ¶ 14);
- Establish a uniform change management process (id. ¶ 15);

- Deploy options for ordering and pre-ordering components for advanced services (id. ¶ 16); and
- Adhere to milestones (with penalty provisions of $100,000 per business day for missed target dates) for SBC/Ameritech's deployment of uniform application-to-application and graphical user interfaces, implementation of a software solution or uniform business rules, and advanced services pre-ordering and ordering options (id. ¶¶ 11, 14, 16).

SBC's OSS are already considered among the best in the industry. They have processed more than 5 million CLEC orders since the 1996 Act, and more than 2.3 million orders in 1998 alone. Likewise, Ameritech's systems have successfully processed approximately 1.4 million CLEC orders. Nevertheless, the merger conditions require SBC/Ameritech to make best practice versions of these systems uniform across its 13 states to lessen CLECs' costs of entry, and to implement many enhancements to existing systems. The implementation of uniform OSS that are even better than the best systems available today will create enormous benefits for CLECs and their customers that, absent the merger, would not be possible. As this Commission has determined, "nondiscriminatory access to these systems, databases, and personnel is integral to the ability of competing carriers to enter the local exchange market and compete with the incumbent LEC."[72]

Despite these obvious benefits, CLECs fault the OSS merger Conditions on several grounds. Several CLECs claim the implementation schedules are too long, or object to implementation procedures. See AT&T App. A at 35, 39; Sprint at 43-45; NorthPoint at 24-25; CoreComm at 5-7; GST/KMC/Logix/RCN at 4. But, as this Commission has noted,

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[72] Louisiana Order, 13 FCC Rcd at 20653, ¶ 83.

"modification of an incumbent LEC's internal operations support systems to accommodate the needs of the new wholesale 'customers' is a substantial undertaking."[73] The timelines in the Conditions were substantially compressed during the Applicants' discussions with the Commission Staff, and reflect the bare minimum time needed for successful implementation of the required enhancements. Moreover, insofar as implementation depends on a collaborative process with CLECs, the details of implementation will be established through that collaborative process. It would be extremely unwise to lengthen the collaborative process, while shortening the time available for implementation. See ALTS at 13. The length of time needed for implementation will only be certain after the collaborative process is done. Moreover, the CLECs themselves should have a strong interest in quickly resolving the collaborative process so that implementation can begin.

Commenters question whether the OSS requirements of the Conditions will foreclose state commissions from adopting different requirements in this area. See, e.g., Public Service Commission of Wisconsin at 4. The Conditions do not prevent the states from exercising their regulatory powers. Thus, while state requirements to offer additional OSS interfaces, systems, or procedures may threaten the uniformity that has been a goal of the Commission, CLECs, SBC, and Ameritech, the Conditions leave room for such requirements if otherwise consistent with state and federal law.

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[73] Notice of Proposed Rulemaking, Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, 13 FCC Rcd 12817, 12824, ¶ 14 (1998).

Several CLECs object to the arbitration procedures that will be used to resolve disputes in the collaborative processes. AT&T App. A at 40-41; MCI WorldCom at 35; Sprint at 43, 50-52; ALTS at 14. In fact, these procedures guarantee impartiality and efficient dispute resolution. They call for an independent third party arbitrator, and require that all proceedings be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Experts are selected from a list of three that SBC/Ameritech prepares. This ensures that CLECs cannot insist upon technical experts who are unfamiliar with SBC/Ameritech's existing OSS, or even ILEC OSS generally, and whose selection would require extensive and expensive "ramp up" time because of their unfamiliarity with SBC/Ameritech's systems. As is being demonstrated in Texas – where the state commission selected Telcordia as its independent OSS testing expert – the practice of retaining experts with extensive technical knowledge of the relevant systems promotes efficient and informed decision making by regulators and the parties.

Sprint argues that allowing arbitration of disputes in the collaborative process improperly shifts the Commission's authority to a private actor. Sprint at 53-54. Where, as here, the Commission establishes standards with reasonable precision, there is no bar to allowing voluntary participants, with the assistance of a neutral, independent arbitrator if necessary, to determine the best way to follow the standards.[74] Indeed, such a rule against negotiation and

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[74] The cases Sprint cites in support of its unlawful delegation argument are inapposite. In two of the cases, the issue was whether the agency had delegated decisionmaking powers to interested parties. See National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1143 (D.C. Cir. 1984) ("[W]e divine no such abdication of the Commission's role as disinterested arbiter to any interested party.") (emphasis added), cert. denied, 469 U.S. 1227 (1985); Perot v. FEC, 97 F.3d 553, 559 (D.C. Cir. 1996) (stating "the general proposition" that an agency may not delegate authority "to a private actor such as the CPD," the Commission on Presidential Debates – composed of only representatives of the Democratic and Republican parties – and analogizing the CPD to a trade association), cert. denied, 520 U.S. 1210 (1997). In Population Inst. v. McPherson, the court considered post hoc agency counsel rationales, not delegation to private parties. See 797 F.2d 1062, 1072 (D.C. Cir. 1986).

arbitration would preclude a collaborative process in which interested parties resolve disputes among themselves.

The Commission, moreover, has not ceded final enforcement authority over SBC/Ameritech's implementation of any of the OSS Conditions. Regardless of the outcome of the OSS collaborative processes, SBC/Ameritech will not have fulfilled its obligations to implement OSS enhancements or processes unless it satisfies the express requirements of the Conditions. (For example, SBC/Ameritech must implement application-to-application interfaces as described in Paragraph 9, even if the agreement reached in Phase 2 (see Conditions ¶ 11.b.) addresses only some aspects of Paragraph 9's requirements). Paragraph 63 in fact makes clear that the Commission has authority to enforce the Conditions' underlying substantive requirements for OSS enhancements. This forecloses Sprint's delegation argument.[75]

Perhaps the most preposterous complaint raised by the CLECs is that the remedies for SBC's failure to meet the implementation schedules for OSS enhancements are too small. See AT&T App. A at 41; MCI WorldCom at 32; Sprint at 45, 48. The payments required by the commitments are of indisputable severity, requiring SBC/Ameritech to pay up to $100,000 per business day for violations. Even for a large company, this represents a considerable sum that would not be accepted as a "normal cost of doing business." Moreover, the commitments expressly reserve to the Commission the power to impose additional penalties consistent with its

[75] See National Park and Conservation Ass'n v. Stanton, No. 98-615, 1999 U.S. Dist. LEXIS 9090, at *33 (D.D.C. June 14, 1999) (holding that "[d]elegations by federal agencies to private parties are . . . valid so long as the federal agency or official retains final reviewing authority"); Perot, 97 F.3d at 559-60 (finding no unlawful delegation where agency has ultimate power to review private party's "discretion in interpreting what actions it must take to comply" with regulation).

authority under the Communications Act. See Conditions ¶ 63; see also, e.g., 47 U.S.C. § 503(b).

Several CLECs complain that the OSS Conditions are not sufficiently comprehensive. See Sprint at 43; Time Warner at 6; CompTel at 33-34; Level 3, at 6-7. But once again, the Conditions are not a substitute for the requirements of the Act. The Conditions instead address local competition issues that allegedly relate to the merger – issues that CLECs themselves have identified in public presentations and in discussions with the Commission Staff in the almost 15 months since this merger was announced. CLECs remain free to argue, in other proceedings before this Commission and in the states that additional OSS enhancements should be required.

The Commission likewise should reject the effort of several CLECs to add various new procedural requirements, particularly third-party testing, to the OSS commitments. See AT&T App. A at 41; MCI WorldCom at 32-33; ALTS at 13-14. The collaborative processes required by the Conditions will allow CLECs and SBC/Ameritech to resolve testing and other implementation details. There is no basis for dictating any particular testing plan, for testing requirements vary with the enhancement at issue and CLEC usage of it. Indeed, the Commission has rejected the notion that third-party testing is required for OSS, noting instead that ILECs may demonstrate the sufficiency of their systems through commercial usage, internal testing, or carrier-to-carrier testing.[76]

For similar reasons, the Commission should not require any alterations to the Conditions regarding the change management process. See AT&T App. A at 43-45; Sprint at 47; MCI

[76] See Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Servs. In Michigan, 12 FCC Rcd 20543, 20628-29, ¶ 161, 20658-59, ¶ 216 (1997) ("Michigan Order").

WorldCom at 34. The entire purpose of the change management process is cooperation between CLECs and ILECs, and dictating terms for the process would be at odds with that cooperative endeavor. With respect to existing change management processes, SBC/Ameritech remains bound by its existing agreements. If CLECs desire a different approach from that developed in the region-wide collaborative process under Paragraph 15, they are free to request a different arrangement from SBC/Ameritech and present their request to the state commission in arbitration if necessary. See Conditions ¶ 15.[77]

Some commenters ask the Commission to apply the same timetables for all OSS enhancements in Connecticut and Nevada as in the remainder of the SBC/Ameritech states.[78] See, e.g., CTC at 7-8; GST at 14. The time frames in the Conditions were established, however, in recognition of the fundamentally different OSS and legacy systems in those states (and especially those used in Connecticut by SNET, which was only recently purchased by SBC). Harmonizing these systems with those in the rest of the SBC/Ameritech states will require a longer implementation period, but – as with all states – this will be done as soon as possible.

Finally, AT&T and MCI WorldCom specifically complain about the timing of the implementation of uniform business rules. AT&T App. A at 35, 37; MCI WorldCom at 29.[79]

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[77] AT&T argues that SBC/Ameritech's change management process "gives no recognition to existing change management processes within the region." AT&T App. A at 43. However, SBC/Ameritech already has expressed its willingness to consolidate its existing processes into a single one for the region.

[78] Similar arguments are made regarding implementation of the FPPP.

[79] AT&T also complains that Paragraph 14 permits the deployment of a "software solution" as an alternative to the deployment of uniform business rules. AT&T App. A at 37. The software solution does not in any way disadvantage AT&T or other CLECs. This "mask" enables CLECs to operate vis-à-vis both SBC and Ameritech using a uniform set of business rules, while enabling SBC and Ameritech internally to operate (if necessary) under different sets of rules. CLECs would perform transactions under a single set of rules, even though SBC/Ameritech might process these requests using different rules.

They note that electronic interface enhancements will be implemented pursuant to the Conditions before uniform business rules are required to be in place for local service requests across the 13 SBC/Ameritech states. There is no conflict in these requirements. To the extent that implementation of a particular enhancement required by the Conditions requires uniform business rules across the 13 states, implementation of that interface will include the adoption of the uniform business rules prior to the general deadline for uniformity set out in Paragraph 14.

b. OSS: Waiver of Charges.

Although SBC and Ameritech have each already incurred enormous costs to provide CLECs access to electronic OSS interfaces, the Conditions provide that the combined company will not impose a charge for using such electronic interfaces for a period of three years. Several commenters suggest that this waiver of OSS charges should be extended even further, both in time (beyond three years) and application (to manual interfaces). NALA at 3-4; Level 3, at 7; NorthPoint at 20-21; TRA at 34.

These commenters ignore the fact that eliminating charges for use of manual interfaces would undermine one purpose of the OSS waiver condition – creating an additional incentive for CLECs to use electronic interfaces that will, in the long term, both ease and expedite their local entry and reduce industry costs. Nor is there any basis for extending the waiver beyond the time needed to fulfill its purpose of promoting use of electronic interfaces. See AT&T App. A at 45-49. SBC/Ameritech is fully entitled under the Act to recover the costs of providing access to its OSS, costs which are incurred exclusively for the benefit of CLECs. Nor is there anything suspect or impermissible about recovering, through the charges for UNEs and resold services, the OSS-related costs associated with those facilities and services. See AT&T at 11-12. These

charges are not the same as (and do not overlap with) the charges assessed on CLECs for usage of particular OSS interfaces.

c. OSS: Assistance for Small CLECs.

The Conditions require SBC/Ameritech to take special measures to assist small CLECs with OSS issues. The only complaints about this Condition are that the threshold for what constitutes a "small" CLEC should be lowered, see CompTel at 34, and that the process for verifying whether a CLEC is "small" should be conducted by the FCC instead of state commissions, see NorthPoint at 21.

The aid available under Paragraph 19 is meant to help those CLECs that genuinely need it because of their relatively limited resources. And the $300 million annual revenue cap is hardly an unreasonable place to draw the line. See Conditions ¶ 19.a. According to the New Paradigm Research group 1999 CLEC Report, of the 112 CLECs reporting revenues in 1998, 102 (92 percent) meet the Conditions' criteria for being a small CLEC.[80] To the extent that there are disputes about whether a CLEC is small, the state commissions are better suited to make this determination since they more closely monitor CLEC activity. See Michigan Order, 12 FCC Rcd at 20559, ¶ 30 (noting "state commissions' knowledge of local conditions and experience in resolving factual disputes" involving CLECs).

6. Collocation Compliance.

Before the merger closes, SBC and Ameritech will have independent auditors conduct a review to determine whether they have in place in each of their states methods and procedures to

[80] 1999 CLEC Report, at ch. 10 (this includes 17 CLECs that did not report 1998 revenue, but for which 1999 projected revenues are far below the $300 million mark).

ensure compliance with the FCC's recent collocation rules. SBC and Ameritech have also agreed to file a tariff or offer to amend their existing interconnection agreements in all 13 states to demonstrate compliance with the FCC's collocation requirements.[81] Again, SBC and Ameritech will do this even before the merger closes. Before the merger closes, SBC and Ameritech shall propose to the Commission an independent auditor to verify SBC/Ameritech's compliance with the FCC's collocation requirements for the first 8 months after the Merger Closing Date.

Many commenters dismiss this Condition by claiming SBC and Ameritech have promised simply to fulfill a pre-existing duty. See, e.g., AT&T App. A at 27; MCI WorldCom at 8; Focal at 16-18; CoreCom at 2-3. According to these commenters, the Condition offers no public benefit.

These commenters are fundamentally mistaken. SBC's and Ameritech's commitments go beyond their existing duties. The existing collocation rules do not require independent auditors to verify the existence of standard terms or related methods and procedures, nor do they require an intensive independent review of an ILEC's performance to determine compliance. CLECs have frequently complained that it is difficult to demonstrate that ILECs have violated the Act's collocation requirements because they do not have access to relevant information. The collocation compliance plan addresses this concern. And, of course, methods that make it easier for the Commission to detect noncompliance will inevitably encourage greater compliance. Indeed, that is why CLECs like NorthPoint have applauded this condition. NorthPoint at 5.

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[81] The Kansas Corporation Commission asks whether Paragraph 4 of the Conditions, which refers to the "standard terms and conditions for collocation," includes pricing. Kansas Corporation Commission at 2. Standard terms and conditions will include prices where applicable.

Commenters' requests that provisioning intervals be included in the Conditions are also meritless. Allegiance at 3; Focal at 17. Just four months ago, the Commission considered these requests and rejected them, concluding that it did "not yet have sufficient experience with the implementation of these new collocation arrangements to suggest time frames for provisioning." Collocation and Advanced Services Order ¶¶ 52-55. In the short time since that order was issued, the Commission has not gained such experience. There is no basis for adopting such intervals here.

Some commenters further complain that the audit provisions of the plan leave too much discretion at the hands of SBC, Ameritech, and the independent auditor. See, e.g., AT&T App. A at 30-34; MCI WorldCom at 26; Level 3, at 4-5. These commenters ignore the multitude of restrictions the Conditions contain. First, the independent auditor selected by SBC and Ameritech must be acceptable to the Commission. Conditions ¶ 6. The Commission will obviously approve only those auditors who are truly independent. Second, the Conditions establish a detailed set of requirements for the audit. For example, a mere two months after the Merger Closing Date, SBC/Ameritech will submit the preliminary audit requirements, including the proposed scope of the audit and the extent of compliance and substantive testing to the Commission's audit staff. Id. ¶ 6.a. During the course of the audit, the independent auditor will inform the Staff of any revisions to the program and notify the Staff of any meetings with SBC/Ameritech relating to the audit. Id. ¶ 6.b. Ten months after the merger closing date, the auditor will submit a report to the Commission. This report will also be made available to the state commissions. The Commission and the state commissions can readily verify the audit and determine whether SBC/Ameritech has complied with the Act and the Commission's order. Moreover, for two years following the submission, the Commission shall have access to the

working papers and supporting materials of the auditor. Id. ¶ 6.g. This process insures considerable participation by the Commission at every meaningful juncture. Indeed, this relationship between the FCC and an independent auditor has proved effective for over ten years, as demonstrated by the Cost Allocations Manual audit.[82]

AT&T also suggests that this Condition is a license to flout the Commission's rules because it does not contain a remedy for noncompliance. AT&T App. A at 32-33. As an initial matter, AT&T completely ignores the Commission's general power to sanction parties that fail to comply with its rules. Nothing in the Conditions strips the Commission of its authority to enforce the Collocation and Advanced Services Order; SBC/Ameritech is subject to the same sanctions as any other ILEC if it violates the order. The Conditions buttress the Commission's authority because they make detecting violations that much easier for the Commission.[83] AT&T also neglects to recognize the general enforcement provisions of the Conditions. If the audit reveals noncompliance by SBC/Ameritech, the Commission may extend the effective period for

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[82] See Notice of Proposed Rulemaking, Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities; Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies, To Provide for Nonregulated Activities and To Provide for Transactions Between Telephone Companies and Their Affiliates, 104 F.C.C.2d 59, 84-85, ¶ 54 (1986) ("We propose to augment our routine audit processes, which include review of cost allocations, by requiring each company to submit each year the report of an independent auditor attesting that the company has designed and implemented its cost allocation manual in a manner consistent with regulatory requirements.").

[83] Covad alleges that Ameritech's collocation practices do not comply with the Collocation and Advanced Services Order. Covad at 19-30. Covad's allegations are based solely on Covad's inaccurate, unilateral reading of Ameritech's proposed interconnection agreement amendment language and its own interpretation of the new rules. Ameritech made its proposed amendment language available via its TCNet website and also sent notice to carriers, including Covad. Rather than engage with Ameritech in productive, good faith negotiations to reach rates, terms and conditions for the new collocation services and features prescribed by the Order, Covad is attempting to impose its views through this merger proceeding. Ameritech stands behind its proposed amendment as a good faith offering in compliance with the Commission's collocation rules. And Ameritech is fully prepared to enter into negotiations to discuss specific implementation details of concern to carriers. Moreover, if Ameritech's amendment and its tariffs do not meet the standards of the Order, this will be detected and reported by the auditor, and the Commission will be in a position to take immediate action.